RECEIVED
JUL 23 1982
OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

---

Case No. _____

---

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

---

ON APPEAL FROM THE SUPREME COURT OF OHIO

---

# JURISDICTIONAL STATEMENT

---

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

July 23, 1982

INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provisions and Statutes | 3 |
| Raising the Federal Question | 3 |
| Statement of the Case | 3 |
| The Question is Substantial | 4 |
| Conclusion | 8 |
| Appendix | 9 |


CITATIONS

Cases:


Boddie v. Connecticut, 401 U.S. 371 (1971) . . . . . 7

Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1964) . . . . . 6

Cunningham v. Mansfield General Hospital, ___ Ohio App.2d ___ (Case No. 80 AP-970, June 11, 1981), appeal dismissed, ___ Ohio St.2d ___ (Case No. 82-301, April 28, 1982) . . . . . 5,7

G.D. Searle & Co. v. Cohn, ___ U.S. ___, 50 U.S.L.W. 4243 (February 24, 1982). . . . . 6

Gholston v. Martin, ___ Ohio App.2d ___ (Case No. 81 AP-654, December 23, 1981), appeal dismissed ___ Ohio St.2d ___ (Case No. 82-301, April 28, 1982 . . . . . 5,7

Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972) . . . . . 5,7

Payne v. Superior Court, 17 Cal.3d 908, 553 P.2d 565 (1976) . . 6

Plymer v. Doe, ___ U.S. ___, 50 U.S.L.W. 4650 (June 15, 1982). . 7

Shapiro v. Thompson, 394 U.S. 618 (1969) . . . . . 7

Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) . . . . . 6

Urie v. Thompson, 337 U.S. 163 (1949) . . . . . 6

U.S. v. Kubrick, 444 U.S. 111 (1979) . . . . . 6

Wilson v. Iseminger, 185 U.S. 55 (1902) . . . . . 6

Wyler v. Tripi, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971) . . .5,6,7

Statutes:

Ohio Revised Code Ann. (Page) §2305.11(A) . . . . . 2,3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

No. _____

---

LOIS GHOLSTON,

Appellant,

vs.

EDWARD M. MARTIN, JR., M.D., et al,

Appellees.

---

ON APPEAL FROM THE SUPREME COURT OF OHIO

---

# JURISDICTIONAL STATEMENT

---

Appellant Lois Gholston appeals from the final judgment of the Supreme Court of Ohio, entered April 28, 1982, dismissing her appeal from the Tenth Judicial District Court of Appeals which asserts the unconstitutionality, under the 14th Amendment to the United States Constitution, of Ohio's malpractice statute of limitations, Ohio Revised

Code §2305.11(A), as applied by Ohio courts to bar her claim.

## OPINIONS BELOW

The opinions of the Ohio Court of Appeals Tenth District (Case No. 81 AP-654, December 23, 1981) and the denial of the Motion to Certify by the Ohio Supreme Court (Case No. 82-301, April 28, 1982) are attached hereto.

## JURISDICTION

The judgment of the Supreme Court of Ohio, dismissing Mrs. Gholston's appeal from the Tenth Circuit Court of Appeal's dismissal of her suit due to the statute of limitations, was entered on April 28, 1982. See p. 14, infra. A notice of appeal to this Court was filed in the Supreme Court of Ohio on June 24, 1982. See p. 15 , infra. This case is being docketed in this Court within 90 days from the dismissal of appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

## QUESTION PRESENTED

Whether §2305.11 of the Ohio Revised Code is violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States when, first, it denies an injured plaintiff access to state courts before she has, or could reasonably be expected to have, knowledge of her injury, and, second, when its application by the Ohio Supreme Court allows malpractice claims based on foreign objects left in the patient's body to accrue upon discovery of the object, while all other malpractice claims accrue at the later of the neglient act or the termination of the doctor-patient relationship.

## CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment 14, states in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Ann. (Page) §2305.11(A) states in relevant part:

> An action for...malpractice against a physician, podiatrist, or a hospital...shall be brought within one year after the cause thereof accrued....

## RAISING THE FEDERAL QUESTION

The Appellant has adequately discharged her burden of raising the federal question in the lower courts. Appellant expressly raised the claim that the application of the Ohio statute of limitations for medical malpractice claims in the instant case violates her rights to equal protection under the laws, due process of law, and access to the courts as protected by the Fourteenth Amendment to the United States Constitution. The Court of Appeals of Ohio declined to address the constitutional issues and affirmed the lower court's application of the statute. (Decision 81-AP-654, December 23, 1981.)

The Supreme Court of Ohio denied review of the constitutional question. (Case No. 82-301, April 28, 1982.)

## STATEMENT OF THE CASE

Appellee Edward M. Martin, M.D. is a medical doctor licensed to practice in Ohio. On September 25, 1977 Appellee Lois Gholston came under the Appellee's care at the Ohio State University Hospital with complaints of a lump in her right breast. Appellee did a biopsy of the lump and made a diagnosis of low grade carcinoma or colloid tumor in

situ. The Appellee advised Mrs. Gholston that a radical mastectomy was required and removed her right breast in an operation at the Ohio State University Hospital on October 5, 1977. Mrs. Gholston's last visit to Dr. Martin was in September 1978.

On March 8, 1980 Mrs. Gholston was told by Dr. Brooks, a competent medical authority, that the radical mastectomy performed on her had been unnecessary, and that the colloid tumor in situ should have been excised without the removal of her breast.

After discovering the Appellee's negligence and malpractice, Mrs. Gholston filed suit against the Appellee on February 18, 1981 in the Common Pleas Court of Franklin County, Ohio, within one year of her discovery. Defendant-Appellee filed a motion to dismiss claiming the statute of limitations barred Appellant's claim because suit was commenced over one year after her last treatment by him, and therefore more than one year after the termination of the physician-patient relationship. On June 16, 1981 the trial court granted the Appellee's Motion to Dismiss, following the existing Ohio Supreme Court interpretation of the statute, Ohio Revised Code §2305.11.

The Court of Appeals of Ohio, Tenth Judicial District, affirmed the dismissal on December 23, 1981 (Case No. 81 AP-654). The Supreme Court of Ohio dismissed Mrs. Gholston's appeal on April 28, 1982 (Case No. 82-301.)

## THE QUESTION IS SUBSTANTIAL

This case presents the substantial question of how far a state may proceed in its stated desire to reduce the number of malpractice suits in its jurisdiction before it violates the Due Process and Equal

Protection guarantees of the Fourteenth Amendment.

The present status of the applicable Ohio law is as follows. An action for medical malpractice is barred unless brought within one year after the cause thereof accrued. Ohio Revised Code §2305.11(A). The cause accrues when one of two events happens: either the act of malpractice or the termination of the physician-patient relationship, whichever is later. Wyler v. Tripi, 25 Ohio St.2d 164, 157 N.E.2d 419 (1971). As an exception the Ohio Supreme Court has adopted the rule that the cause accrues when a patient discovers a foreign object left in the body after surgery. Melnyk v. Cleveland Clinic Foundation, 32 Ohio St.2d 198, 290 N.E.2d 916 (1972). The Ohio Supreme Court has refused to adopt a discovery rule in all other malpractice situations. Wyler, supra. It has refused to review cases proposing the discovery rule for other kinds of malpractice. Cunningham v. Mansfield General Hospital, Ohio App., 10th Dist., Case No. 80 AP-970, June 11, 1981, appeal dismissed (Ohio Supreme Court, Case No. 81-204, October 23, 1981); Gholston v. Martin, Ohio App., 10th Dist., Case No. 81 AP-654, December 23, 1981; appeal dismissed (Ohio Supreme Court, Case No. 82-301, April 28, 1982), (The instant case.)

Mrs. Gholston only discovered her injury one and one-half years after the termination of her doctor-patient relationship. She did, however, file her complaint within one year of her discovery. It is the barring of her claim even before she had any reasonable opportunity to know of it, much less begin litigation, that is the basis of the Due Process issue.

This Court has stated that a state has wide powers to preserve its citizens' ability to bring actions in state court, as a defendant's shelter under a statute of limitations is essentially a gift from the

state legislature. G.D. Searle & Co. v. Cohn, ___ U.S. ___, 50 U.S.L.W. 4243 (February 23, 1982). A state cannot be said to have the same leeway in restricting a citizen's ability to seek redress of wrongs in court, as her right of access is guaranteed by the Fourteenth Amendment. Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976); Payne v. Superior Court, 17 Ca.3d 908, 553 P.2d 565 (1976). Mrs. Gholston's claim must not be denied, as "the right of the litigant to be heard is one of the fundamental rights of due process of law. The denial of the right requires reversal." Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1964).

This Court has recognized that the Constitution places boundaries on statutes of limitation, as a "full opportunity" to litigate must be provided to all, or else the result "...would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." Wilson v. Iseminger, 185 U.S. 55, 62 (1905). The recent cases of Urie v. Thompson, 337 U.S. 163 (1949) and U.S. v. Kubrick, 444 U.S. 111 (1979), were cases interpreting federal statutes and did not resolve the issues presented here. Mrs. Gholston did not, and reasonably could not, appreciate the existence of her injury within the one year period set down by the legislature. Therefore her claim is barred before there is any reasonable opportunity to litigate it. The absurdity of extinguishing a claim before there is any chance to litigate makes the state's offer of judicial relief merely delusive, and therefore violates the Due Process Clause. The issue presented puts the statutory schemes of several states into doubt.

The application of the statute by the Supreme Court of Ohio presents a clear equal protection issue. In Wyler, supra, the court declared that malpractice claims accrue, at the latest, when the doctor-patient

relationship terminates. Yet in Melnyk, supra, the court constructed an exception, ruling that when a foreign object is left in a patient's body, the claim accrues upon discovery of the object, while all other malpractice claims are still under the Wyler rule. The Ohio Supreme Court has refused to extend the benefit of the discovery rule to malpractice plaintiffs whose claims are not based on foreign objects in the body. Cunningham, supra; Gholston, supra. Since the right to access is a fundamental right incorporated in the Fourteenth Amendment, "strict scrutiny" must apply and the distinction between claimants can be made only if it furthers a compelling state interest. Shapiro v. Thompson, 394 U.S. 618 (1969). There is no state interest present so compelling as to allow the arbitrary acceptance of foreign object claims and the rejection of all other malpractice claims.

Even if strict scrutiny is not adopted, the decisions of this Court have indicated that state imposed classifications which involved interests important to society must pass a level of scrutiny higher than a mere rational relationship between a legitimate state goal and the means used. Plymer v. Doe, ___ U.S. ___, 50 U.S.L.W. 4650 (June 15, 1982). Legislative decrees which usurp the judicial function should be viewd at this raised standard, as this Court has recognized that "regularized resolution of conflicts" is perhaps the most basic foundation of an organized and cohesive society. Boddie v. Connecticut, 401 U.S. 371 (1971). The statute at issue falls before such a test, as the distinction between claims involving a foreign object in the body and claims based on negligent diagnosis or treatment does not further the state goal of reducing claims well enough to justify the denial of equal access to

the similarly situated groups. Therefore, Mrs. Gholston cannot be denied her relief while another patient injured at the same time by a doctor's negligence is heard in court. The absence of any discernable difference between the claims presents a clear Fourteenth Amendment issue.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

July 23, 1982

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Lois Gholston,

Plaintiff-Appellant,

v.

No. 81AP-654

Edward W. Martin, M.D.,
aka Ted Martin, M.D., and
Charles I. Hecht, M.D., et al.,

Defendants-Appellees.

---

D E C I S I O N

Rendered on December 23, 1981

---

DUDA, ELK AND WOHL,
MR. JOHN E. DUDA,
800 Bond Court Building,
Cleveland, Ohio 44114,
For Plaintiff-Appellant.

PORTER, WRIGHT, MORRIS & ARTHUR,
MR. JOSEPH W. RYAN, JR., of Counsel,
37 West Broad Street,
Columbus, Ohio 43215,
For Defendant-Appellee,
Edward W. Martin, M.D.

ALEXANDER, EBINGER, FISHER,
McALISTER & LAWRENCE,
MR. THOMAS P. MICHAEL, of Counsel,
17 South High Street,
Columbus, Ohio 43215,
For Defendant-Appellee,
The Ohio State University Hospitals.

---

STRAUSBAUGH, P.J.

This is an appeal by plaintiff from a judgment in the Common Pleas Court granting defendant's motion to dismiss and finding that the statute of limitations bars plaintiff's claim.

The record indicates that, on Feburary 18, 1981, plaintiff filed her complaint against defendants alleging that:

> "5. On or about September 25, 1977 Plaintiff came under the care of Defendants with complaints of a lump in the right breast.
>
> "6. Defendants did a biopsy of said lump and made a diagnosis of low grade carsinoma or colloid tumor insitu.
>
> "7. Defendants negligently and improperly recommended to Plaintiff that she consent to the removal of her breast and misrepresented to Plaintiff that it was necessary to remove her breast.
>
> "8. On or about the 28th day of September, 1977 Defendants performed a radical masectomy removing Plaintiff's right breast.
>
> "9. Plaintiff states that the radical masectomy was unnecessary and was performed by the Defendants without her fully informed consent and constituted medical malpractice, fraud and misrepresentation.
>
> "10. Plaintiff continued under Defendant's care until about September of 1978.
>
> "11. Plaintiff did not know of the Defendants' negligence, malpractice, fraud and misrepresentation until her doctor requested her medical records from the Ohio State University Hospitals, when on or about March 8th, 1980 he informed the Plaintiff that the radical masectomy was unnecessary and was improperly performed."

The record further shows that defendant's answer set forth his first defense that plaintiff's claim against this defendant is barred

by the statute of limitations, R. C. 2305.11, requiring that an action for malpractice against a physician shall be brought within one year after the cause thereafter accrued.

The plaintiff states a single assignment of error:

> "The Trial court erred in granting defendants' motion to dismiss and determining that the Statute of Limitations bars the claim."

The Supreme Court held, in the syllabus, of Wyler v. Tripi (1971), 25 Ohio St. 2d 164:

> "Under R. C. 2305.11, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates. (Gillette v. Tucker, 67 Ohio St. 106; Bowers v. Santee, 99 Ohio St. 361; and DeLong v. Campbell, 157 Ohio St. 22, followed.)"

The Supreme Court, in Melnyk v. Cleveland Clinic (1972), 32 Ohio St. 2d 198, stated in the syllabus:

> "Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act. (Wyler v. Tripi * * * distinguished.)"

The plaintiff herein does not allege that this case involves the foreign object exception to the one-year statute of limitations.

Plaintiff argues against the law as set down by the Supreme Court in Wyler, supra, and states that a cause of action for malpractice should accrue and the statute commence to run from the time the patient discovers, or with due diligence, should have discovered his injury. However, this court does not have the power to modify or change the law as set forth by the Supreme Court. Plaintiff's cause of action accrued

upon the termination of the physician-patient relationship and her failure to bring her claim within the statutory time period forecloses her rights. If any change is to be made in the Ohio law relating to this question, it must be made by the Supreme Court. Plaintiff's single assignment of error is overruled and the judgment is affirmed.

Judgment affirmed.

McCORMAC and MOYER, JJ., concur.

---

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

| | | |
|---|---|---|
| Lois Gholston, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 81AP-654 |
| Edward W. Martin, M.D., et al., | : | |
| Defendants-Appellees. | : | |

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 23, 1981, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

STRAUSBAUGH, P. J., McCORMAC & MOYER, JJ.

By _____
Judge Dean Strausbaugh, P. J.

cc: John E. Duda
Joseph W. Ryan, Jr.
Thomas P. Michael

THOMAS J. ENRIGHT
CLERK OF COURTS
1981 DEC 23 PM 4:17

# THE SUPREME COURT OF OHIO

*THE STATE OF OHIO,*
*City of Columbus.*

*19 82 TERM*

*To wit:* April 28, 1982

Lois Gholston,

Appellant,

*vs.*

Edward W. Martin et al.,

Appellees.

*No.* 82-301

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

*for* FRANKLIN *County*

TO CERTIFY ITS RECORD

*It is ordered by the Court that this motion is overruled.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

*COSTS:*

*Motion Fee, $20.00, paid by* John E. Duda

*I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.*

*Witness my hand and the seal of the Court this.....day of..... 19.....*

.....*Clerk*

.....*Deputy*

IN THE SUPREME COURT OF OHIO

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

Case No. 82-301

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Lois Gholston, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, overruling the motion to certify, entered in this action on April 28, 1982.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

FILED
JUN 24 1982
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed this 18th day of June, 1982, to Joseph J. Ryan, Jr., 37 West Broad Street, Columbus, Ohio 43215; and to Thomas P. Michael, 17 South High Street, Columbus, Ohio 43215.

JOHN E. DUDA

RECEIVED
JUL 23 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

Case No. 82 5100

October Term, 1982

LOIS GHOLSTON,

Appellant,

vs.

EDWARD W. MARTIN, M.D., et al,

Appellees.

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the Appellant, Lois Gholston, be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached Affidavit.

JOHN E. DUDA
800 Bond Court Building
Cleveland, Ohio 44114
(216) 696-4880
ATTORNEY FOR APPELLANT

STATE OF OHIO )
( SS: AFFIDAVIT
COUNTY OF CUYAHOGA )

I, LOIS GHOLSTON, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

My breast was removed by Dr. Martin at Ohio State University Hospitals on September 28, 1977. I did not discover that it was unnecessary for Dr. Martin to remove my breast until March 8, 1980, which was more than one year after Dr. Martin last treated me. On February 18, 1981 I brought suit against Dr. Martin and others, which was within one year after my discovery of their malpractice. The Ohio Courts have denied me redress on the ground that my suit is barred by the Ohio statute of limitations. I claim a denial of due process and equal protection of the laws afforded me by the U.S. Constitution.

Lois Gholston
LOIS GHOLSTON

Sworn to before me and subscribed in my presence this 24th day of May, 1982.

NOTARY PUBLIC

BRUCE E. DUDA, Attorney At Law
Notary Public - State of Ohio
My commission has no expiration date